

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MARK J. NOVICK	:	CIVIL ACTION
	:	
v.	:	
	:	No. 01-CV-258
UNUMPROVIDENT CORPORATION, et al.	:	

**M E M O R A N D U M**

Ludwig, J.

July 10, 2001

In this breach of insurance policy action, defendants UnumProvident Corporation and Paul Revere Life Insurance Company move to dismiss and strike under Fed. R. Civ. P. 12(b)(6) and 12(f).<sup>1</sup> Jurisdiction is diversity, and Pennsylvania law governs the substantive issues. The motion is ruled on as follows.

I. Emotional distress damages - granted. “[A] plaintiff may not ordinarily recover emotional distress damages arising from a breach of contract.”<sup>2</sup> Krisa v. Equitable Life Assurance Soc’y, 109 F. Supp. 2d 316, 323 (M.D. Pa. 2000). However, “[e]motional distress damages may be recoverable on a contract where . . . ‘the breach is of such a kind that serious emotional disturbance was a particularly likely result.’”<sup>3</sup> D’Ambrosio v.

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<sup>1</sup> Under Rule 12(b)(6), the allegations of the complaint are accepted as true, and all reasonable inferences are drawn in the light most favorable to the plaintiff, and dismissal is appropriate only if it appears that plaintiff would prove no set of facts that would entitle her to relief. See Brown v. Philip Morris Inc., 250 F.3d 789, 796 (3d Cir. 2001). Under Rule 12(f), “the court may order stricken from any pleading any . . . redundant, immaterial, impertinent, or scandalous matter.” Fed. R. Civ. P. 12(f).

<sup>2</sup> Plaintiff concedes that the claims for emotional distress in Count II, bad faith, and Count III, violation of the Unfair Trade Practices and Consumer Protection Law, should be stricken. Pltf. mem. at 9 n.1.

<sup>3</sup> Under the Restatement, exceptions to the rule that emotional distress damages are not recoverable for breach of contract are (1) where the breach caused

Pennsylvania Nat'l Mut. Cas. Ins. Co., 494 Pa. 501, 509 n.5, 431 A.2d 966, 970 n.5 (1981) (quoting Restatement (Second) of Contracts § 367 (Tent. Draft No. 14, March 1, 1979), now Restatement (Second) of Contracts § 353)). For example, “if an insured's ability to secure the basic necessities of life were foreseeably very likely to hinge upon receiving a payment under an insurance contract, serious emotional disturbance might well be a particularly likely result of failure to pay a claim.” Leo v. State Farm Mut. Auto. Ins. Co., 908 F. Supp. 254, 257 (E.D. Pa. 1995) (quotations omitted).

Plaintiff maintains that he became disabled from his occupation as the vice-president and managing partner of Integrity Textiles, Inc. after being diagnosed with manic depression and extreme anxiety. Am. cmplt. ¶¶ 18-19. According to the amended complaint, “[a]s a direct and proximate result of Defendant’s denial of disability benefits and breach of contract, Plaintiff has suffered and continues to suffer severe emotional distress including panic attacks, depression, eating disorder and sleeplessness, for which [he] has sought psychological treatment. Defendant knew or should have known that their breach of the terms of the disability insurance policy would result in severe emotional distress to the Plaintiff.” Id. ¶¶ 38-39.

While accepted as true for this motion, these facts are not sufficient to recover emotional distress damages. “[T]o hold otherwise would support the existence of a cause

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bodily harm; and (2) when the contract or breach is such that serious emotional disturbance was a particularly likely result. Restatement (Second) of Contracts § 353; see Jean Anderson Hierarchy of Agents v. Allstate Life Ins. Co., 2 F. Supp. 2d 688, 694 (E.D. Pa. 1998) (citing Rodgers v. Nationwide Mut. Ins. Co., 344 Pa. Super. 311, 319-20, 496 A.2d 811, 815 (1985)). The first exception “may nearly always be regarded as one in tort.” Restatement (Second) of Contracts § 353, cmt. a. Examples of the second exception are “contracts of carriers and innkeepers with passengers and guests, contracts for the carriage or proper disposition of dead bodies, and contracts for the delivery of messages concerning death.” Id.; see Rittenhouse Regency Affiliates v. Passen, 333 Pa. Super. 613, 616, 482 A.2d 1042, 1043 (1984).

of action for emotional distress whenever an insured asserts a breach of contract action against an insurer arising out of the insurer's handling of a policy claim." LaPlante v. Provident Life and Acc. Ins. Co., Civ. A. No. 3:00-Cv-1580 (M.D. Pa. Jan 11., 2001) (unpublished opinion) (emotional distress damages not recoverable in action for denial of benefits where plaintiff claimed to suffer from extreme anxiety and aggravation of pre-existing hypertension based on insurer's handling of a policy claim); cf. Duffy v. Nationwide Mut. Ins. Co., Civ. A. No. 93-1474, 1993 WL 475501, at \*3 (E.D. Pa. Nov. 10, 1993) (emotional distress damages for breach of contract not dismissed where insurance carrier did not make restitution payments relating to drunk-driving accident and, as a result, plaintiff was incarcerated).

II. Future benefits - denied. According to plaintiff, defendants should be required to pay the maximum future term of policy benefits in the amount of \$1,463,053.34.<sup>4</sup> Am. cmplt. ¶ 51. A policy holder asserting breach of a disability insurance policy is not entitled to accelerated recovery of future benefits, absent complete repudiation – i.e., a clear and unequivocal refusal to perform. See Brosnan v. Provident Life and Acc. Ins. Co., No. Civ. A. 96-4605, 1999 WL 165684, at \*2 (E.D. Pa. March 11, 1999).

Drawing reasonable inferences in plaintiff's favor, defendants may have communicated an absolute refusal to perform on the contract, am. cmplt. ¶ 45. Therefore, the requested relief will not be stricken at this point. Nevertheless, plaintiff must ultimately present evidence to prove that "once a judgment has been entered against it defendant will

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<sup>4</sup> Presumably, this figure represents the number of years until plaintiff reaches age 65, multiplied by \$8,000 per month, as set forth in the policy.

continue to improperly deny the benefits owed.”<sup>5</sup> Doe v. Provident Life and Acc. Ins. Co., 936 F. Supp. 302, 308 (E.D. Pa. 1996).

III. Breach of Consumer Protection Law – denied. The Unfair Trade Practices and Consumer Protection Law (UTCPL), 73 Pa. C.S.A. §§ 201-1 et seq., provides relief for misfeasance rather than nonfeasance.<sup>6</sup> Smith v. Nationwide Mut. Fire Ins. Co., 935 F. Supp. 616, 620 (W.D. Pa. 1996) (citation omitted). Misfeasance is the improper performance of a contractual obligation; nonfeasance is the failure to perform. Id.

The amended complaint alleges that defendants were predisposed toward terminating plaintiff’s benefits and were “extreme and outrageous” in investigating his claim. Am. cmplt. ¶¶ 65-70. Defendants’ position is that an insurer’s failure to pay a claim is not actionable under the UTCPL. However, the improper investigation allegation “can be better [resolved] on summary judgment. For present purposes, this allegation establishes a viable UTCPL claim.”<sup>7</sup> Smith, 935 F. Supp. at 621.

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<sup>5</sup> However, plaintiff does not claim that defendant has engaged in repetitive denials with regard to other insureds or that he has had to bring previous suits to enforce his rights. Doe, 936 F. Supp. at 308.

<sup>6</sup> The UTCPL protects “any person who purchases . . . services primarily for personal, family or household purposes and thereby suffers any ascertainable loss . . . may bring a private action . . . as a result of the use or employment of” unfair or deceptive acts or practices. 73 Pa. C.S.A. § 201-9.2.

<sup>7</sup> See also Mantakounis v. Aetna Cas. & Sur. Co., No. CIV.A. 98-4392, 1999 WL 600535, at \*2 (E.D. Pa. Aug. 10, 1999) (improper investigation by an insurer is generally actionable under the UTCPL); Cake v. Provident Life and Acc. Ins. Co., No. Civ.A. 98-4945, 1999 WL 48778, at \*2 (E.D. Pa. January 15, 1999) (in the course of denying a claim for coverage, an insurer may engage in conduct that constitutes malfeasance or misfeasance, which could be actionable under the Consumer Protection Law); Parasco v. Pacific Indem. Co., 870 F. Supp. 644, 648 (E.D. Pa. 1994) (allegations that post-loss investigation was conducted in unfair manner and that insurer made misrepresentations regarding nature of its contractual obligations stated claim).

IV. Dismissal of UnumProvident Corporation – deferred.<sup>8</sup> Plaintiff’s insurance policy was issued by the Paul Revere Life Insurance Company, which became a wholly owned subsidiary of defendant UnumProvident. According to its vice-president and assistant general counsel, UnumProvident is a Delaware holding company not licensed to sell insurance; did not exist in 1993 when Paul Revere issued the policy to plaintiff; and has not assumed the liabilities of its subsidiaries, including Paul Revere. Roth aff. ¶¶ 1, 5, 7-9, 11.

Plaintiff responds that UnumProvident “is the successor in interest to the Paul Revere Life Insurance Company . . . [and] the corporate veil between UnumProvident and Paul Revere [has been disregarded].” Pltf. mem. at 16-17. Plaintiff’s affidavit states that at some point after acquiring the policy in 1993, “all communications with the Paul Revere Life Insurance Company ceased and the policy was administered by UnumProvident Corporation.” Novick aff. ¶ 3. Moreover, “the claims administrator assigned to my claim by Paul Revere Life Insurance Co. was removed and I was assigned a Unum customer care specialist with whom all further communications were conducted.” Id. ¶ 5. Checks were issued to him by the account of Provident Corporation; his disability was evaluated by representatives of UnumProvident; and correspondence was received on UnumProvident letterhead, including the denial letter, which did not refer to Paul Revere. Id. ¶¶ 6-11. Plaintiff’s view, in short, is that “all actions with respect to the administration of this claim were carried out by UnumProvident Corporation.” Pltf. mem. at 18.

Considering the evidentiary matters submitted by the parties “in a light most

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<sup>8</sup> Upon conference, the parties agreed that, for this argument, evidentiary matters would be submitted and the issue would be resolved under Fed. R. Civ. P. 56.

favorable” to plaintiff as non-movant, together with the relevant caselaw,<sup>9</sup> ruling will be deferred at this point. Baldassare v. New Jersey, 250 F.3d 188, 192 n.1 (3d Cir. 2001). Further discovery should clarify UnumProvident’s relationship with Paul Revere and its role in this dispute.

An order accompanies this memorandum.

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Edmund V. Ludwig, J.

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<sup>9</sup> Under the cases, corporate protection will be preserved unless specific, unusual circumstances call for an exception. See Stevens v. Citigroup, Inc., No. Civ. A. 00-3815, 2000 WL 1848593, at \*3 (E.D. Pa. Dec. 15, 2000). “To warrant piercing the veil, a plaintiff must demonstrate ‘complete domination, not only of finances but of policy and business practice in respect to the transaction attacked so that the corporate entity as to this transaction had at the time no separate mind, will or existence of its own.’” Id. (quoting Craig v. Lake Asbestos of Quebec, Ltd., 843 F.2d 145, 150 (3d Cir. 1988)). Relevant factors: “the failure to observe corporate formalities; non-payment of dividends; insolvency of debtor corporation; siphoning the funds from corporation by dominant shareholders; non-functioning of other officers and directors; absence of corporate records; whether the corporation is a mere facade for the operations of a common shareholder or shareholders; and gross undercapitalization.” Eastern Minerals & Chemicals Co. v. Mahan, 225 F.3d 330, 336 n.7 (3d Cir. 2000) (citation omitted).

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**O R D E R**

AND NOW, this 10th day of July, 2001, the motion of defendants UnumProvident Corporation and Paul Revere Life Insurance Company to dismiss and strike under Fed. R. Civ. P. 12(b)(6) and 12(f) is ruled on as follows.

- I. Motion to strike claim for emotional distress damages (Count I) – granted.
- II. Motion to strike claim for maximum term of benefits (Counts I, II, and III) – denied.
- III. Motion to dismiss claim for breach of consumer protection law (Count III) – denied.
- IV. Motion to dismiss UnumProvident Corporation – deferred.

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Edmund V. Ludwig, J.